> it is reasonable to require that CSAs entered into before April 15, 1997, be subject to resale, but not at a discount . . . . The Commission believes it is unreasonable to require the "old" CSAs to be subject to the discount because they were entered into before BellSouth had any notion as to a resale requirement, and they are commonly discounted already. Applying the discount to "new" CSAs only will allow BellSouth the opportunity to adjust its pricing accordingly.

(Id. at 145.)

In its complaint, AT&T contests the Agreement's treatment of CSAs. First, AT&T complains that the comprehensive exclusion of pre-15 April 1997 CSAs violates the Act's clear command that ILECs "offer for resale at wholesale rates any telecommunications service" provided at retail. (Compl. ¶ 15 (quoting § 251(c)(4)(A).) Second, according to AT&T, the Agreement imposes discriminatory and unreasonable conditions on resale of post-15 April 1997 CSAs by restricting resale to the specific end-user.

1. Pre-15 April 1997 CSAs

Section 251(c)(4) directs that an ILEC shall not impose unreasonable or discriminatory conditions or limitations on the resale of any telecommunications service. AT&T contends that exclusion of an entire category of CSAs does not qualify as a reasonable and nondiscriminatory limitation. In addition to the plain language of 251(c)(4), AT&T notes that the FCC has addressed this issue more directly. In ¶ 948 of the FRO, the FCC declared that:

> [section 251(c)(4)] makes no exception for promotional or discount service offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary

> result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.

FCC First Report and Order, ¶ 948 (emphasis added). Notably, the FCC did create an exemption for promotional offerings lasting less than 90 days. 47 C.F.R. § 51.613. The Eighth Circuit expressly upheld the FCC's hybrid treatment. Iowa Utilities, 120 F.3d at 819.

Inherent in the language of the Act and the FCC's regulations is the recognition that unique situations may arise in the varied negotiations between requesting carriers and ILECs. As such, although "resale restrictions are presumptively unreasonable," the Act provides, and the FCC acknowledges, if narrowly tailored, reasonable and nondiscriminatory restrictions are sometimes lawful. Id. ¶ 939; 47 U.S.C. § 251(c)(4) (providing that an ILEC cannot "impose unreasonable or discriminatory conditions or limitation" on resale). The burden to justify such a restriction falls squarely on the ILEC. 47 C.F.R. § 51.613(b) ("An incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.")

AT&T maintains that the restriction on pre-15 April 1997 CSAs does not satisfy any of the above in that it is not narrowly tailored and the NCUC did not cite evidentiary support for its declaration that the restriction was reasonable. Additionally, no finding was made as to whether the restriction was nondiscriminatory, as required by the Act.

These arguments are well-taken. Beyond Bell-South's assertion

that the compromise reached by the NCUC was "entirely reasonable," there is very little to show that this term of the Agreement is at all consistent with the Act. As noted above, the FCC has specifically renounced claims that special agreements lasting beyond a 90-day period such as CSAs should be exempted from resale at wholesale rates, and the Eighth Circuit upheld this distinction.

As justification for its treatment of CSAs, the NCUC mentioned that it would be unreasonable to force BellSouth to resell "old" CSAs at wholesale rates because BellSouth was unaware of the resell requirement and CSAs are commonly discounted already. (AT&T Agreement Order at 2; J.A. at 144.) Neither of these assertions would seem to justify the special treatment. First, it is unclear how BellSouth could have been unaware of the Act's provisions up until 15 April 1997, over a year after it was signed into law. Neither the NCUC nor BellSouth provided a principled explanation why the 15 April 1997 date was selected. Additionally, BellSouth's unawareness of the Act's wholesale pricing scheme when it entered into a CSA would seem to be irrelevant in light of the Act's built-in profit margin for the ILEC when reselling completed services.

Moreover, the notion that CSAs are likely already discounted is not sufficient to remove them from the Act's clear mandate. Under the wholesale pricing scheme in § 252(d)(3), BellSouth must only resell a service at the retail rate charged to the subscriber, less the costs avoided. Thus, by its basic terms, § 252(d)(3) ensures at least some profit to BellSouth from the sale because the wholesale discount/reduction only encompasses the actual costs that

BellSouth saved by reselling to a telecommunications carrier rather than a regular customer. Thus, theoretically, BellSouth should not suffer any loss at all when reselling a service to a telecommunications carrier as opposed to a regular consumer.

While BellSouth could have demonstrated that, by the nature of CSAs, it in fact avoids no costs when subsequently reselling to a telecommunications carrier, it does not appear to have done this. Finally, it seems undeniable that the NCUC failed to find the restriction to be nondiscriminatory, as this factor was not mentioned at all in the NCUC's discussions or findings. Therefore, it does not seem, at this time, as if this resale restriction is narrowly-tailored, reasonable, and nondiscriminatory, and thus it does not comport with the Act.

Applying the de novo standard of review to this incorrect application of the law, this court will remand this issue to the NCUC. The Agreement's current treatment of pre-15 April 1997 CSAs will be stricken, based on the lack of proper justification and general doubt concerning the legitimacy of such a blanket exemption from the wholesale pricing scheme.

b. Post-15 April 1997 CSAs

AT&T also challenges the second portion of Paragraph 25.5.1 that requires post-15 April 1997 CSAs to be resold at wholesale rates but requires AT&T to market the service only to the originally intended consumer. AT&T asserts that this resale restriction disobeys the FCC's directive that a requesting carrier can purchase services sold by an ILEC to a consumer at volume-based

discounts and resell to any consumer regardless of whether each consumer individually meets the qualifying volume level. In other words, AT&T seeks to have the court construe CSAs as merely encompassing volume-discounts for a particular consumer. Based on this interpretation, Paragraph 25.5.1 improperly restricts AT&T's ability to exercise its volume discount.

BellSouth responds that AT&T mischaracterizes the nature of ¶ 25.5.1's restriction. Rather than triggering FCC regulations on volume discounts, BellSouth maintains that the resale limitation is properly classified as a cross-class restriction that is expressly sanctioned by § 251(c)(4). That section provides that an ILEC shall not impose unreasonable or discriminatory limitations "except that a State commission may, consistent with regulations prescribed by the [FCC] under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." 47 U.S.C. § 251(c)(4). Based on this language, BellSouth argues that Paragraph 25.5.1 merely limits AT&T's resale of the CSA to the category of subscribers to which BellSouth originally sold the service: in this instance, a category of a single consumer.

The FCC ruled that restrictions on volume discount resale "should be considered presumptively unreasonable." FRO, ¶ 953. However, AT&T's classification of the restriction in paragraph 25.5.1 as a volume-based discount issue does not seem accurate. While volume likely played a role in BellSouth entering into a CSA

with a particular customer and offering a discount, there is no evidence that volume alone motivated such contracts. In fact, in its memorandum, the FCC noted that CSAs may include volume, term, special service, customized service, and master service arrangements. (Mem. of the FCC as Amicus Curiae at 15 n.14.) Thus, it does not seem that the CSA resale limitation is easily dismissed as a violation of volume discount rules.

Beyond the volume discount argument, AT&T also asserts that the end-consumer restriction is unreasonable and discriminatory. AT&T acknowledges that § 251(c)(4)(B) authorizes the NCUC, consistent with FCC regulations, to prohibit a reseller from offering a service purchased at wholesale rates to a different category of subscribers than sold to by the ILEC. However, AT&T directs the court to the FCC's discussion in the FRO that AT&T argues precludes the treatment of CSAs as contained in paragraph 25.5.1. In considering the scope of cross-class restrictions under § 251(c)(4), the FCC concluded:

> 962. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of [several other designated services]. . . .
>
> 964. We also conclude that all other cross-

> class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

FRO, ¶¶ 962, 964. Because neither the NCUC nor BellSouth justified or even mentioned how the cross-class restriction was reasonable and non-discriminatory, AT&T maintains that it is invalid.

As stated above, BellSouth contends that the restriction is a legitimate condition on resale under § 251(c)(4)(B)'s language allowing an ILEC to limit resale to a specific "category of subscribers." BellSouth also contends that this type of cross-class limitation facilitates the viability of a regulatory compact under which business prices are kept higher to allow residential prices to remain low.

BellSouth's arguments are not persuasive. As discussed above, although § 251(c)(4)(B) does authorize cross-class restrictions, subsequent explanation of this provision by the FCC seems to indicate that it was aimed at classes of residential consumers. Paragraph 24.3(i) of the Agreement even seems to reflect this thinking as it states "AT&T may not obtain at a wholesale rate a telecommunications service that is available at retail to a specific category of subscribers and offer said service to a different category of subscribers (e.g. resale of residential service to business customers)." (emphasis added). Moreover,

paragraph 25.5.1 does not just limit AT&T's resale to a specific class but limits resale to a specific consumer. BellSouth's contention that a single consumer should be able to qualify as "a category of subscribers" triggers considerable skepticism.

As to BellSouth's additional contention that the restriction is necessary to maintain subsidies for residential service, the argument is facially erroneous under the new scheme embodied in the Act. The Act lifts the unilateral obligation to provide universal service from the ILECs and expressly spreads the responsibility among all telecommunications carriers. See 47 U.S.C. § 254. Consequently, any reliance by BellSouth on a universal service rationalization is rejected.

Therefore, because of the plain language of paragraph 964 of the FRO and the NCUC's overly narrow and unsupported end-user restriction, paragraph 25.5.1 will be struck down as invalid. While BellSouth undoubtedly disagrees with the FCC's explication of § 251(c)(4) in paragraph 964, the FCC's interpretation is not facially inconsistent with that section. As such, it is not within this court's authority to review the propriety of an FCC regulation. See United States v. Fox, 60 F.3d 181, 184 (4th Cir. 1995) (noting that agency rules have "the force and effect of law."). Instead, BellSouth's only recourse to challenge any of the FCC's rules is to proceed directly to a Circuit Court of Appeals. See FCC v. ITT World Communications, Inc., 466 U.S. 463, 468 (1984). To the extent that the NCUC's decision on this issue conflicts with that of the FCC, the FCC controls, and the NCUC's

terms will be stricken as an incorrect application of federal law. Accordingly, Paragraph 25.5.1 will be stricken and remanded to the NCUC for the parties to redraft consistent with this court's direction, the Act, and FCC regulations.

V. Conclusion

For the reasons stated above, the court finds for AT&T and strikes from the Agreement Paragraphs 1.A, 25.5.1 and 30.5 and remands this matter to the NCUC for rearbitration consistent with the terms of this order.

This 27 May 1998.

W. EARL BRITT
Senior United States District Judge

att/bti/sdn/jdb

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF BELL ATLANTIC - PENNSYLVANIA, INC.	:	
For a Determination of Whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility Code	:	Docket No. P-00971307

RECOMMENDED DECISION

THIS DOCUMENT CONTAINS PROPRIETARY MATERIAL

Before
Michael C. Schnierle
Administrative Law Judge

July 24, 1998

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
ISSUED: July 28, 1998

IN REPLY PLEASE
REFER TO OUR FILE
P-00971307

ALAN KOHLER
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PETITION OF BELL ATLANTIC-PENNSYLVANIA, INC.
For a Determination of Whether the Provision of Business Telecommunications
Services Is Competitive Under Chapter 30 of the Public Utility Code

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge Michael C. Schnierle.

An original and nine (9) copies of signed exceptions to the decision, if any, MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265; a copy in the hands of the Office of Special Assistants, Room 210; and a copy in the hands of each party of record no later than August 7, 1998 by 4:30 P.M. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions or reply exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, no later than August 14, 1998 by 4:30 P.M. as well as served upon the parties. A certificate of service shall be attached to the filed exceptions.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535, particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should be clearly labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision.

Parties are also requested to provide the Commission's Office of Special Assistants with a copy of exceptions/reply exceptions on a computer disk, 3 1/2" in size, in Microsoft Word 6.0 format. If Word 6.0 is not available, either Wordperfect 5.1 or ASCII format is acceptable.

Very truly yours,

law
Encls.
Certified Mail
Receipt Requested

James J. McNulty
Secretary

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HISTORY OF THE PROCEEDING

Bell Atlantic-Pennsylvania, Inc. ("BA-PA") filed this Petition for a Determination that Provision of Business Telecommunications Services is a Competitive Service Under Chapter 30 of the Public Utility Code on December 16, 1997. Several parties filed answers and motions to intervene, including the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Office of Trial Staff ("OTS"), AT&T Communications of Pennsylvania, Inc. ("AT&T"), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"), Teleport Communications Group ("TCG"), Sprint Communications Company L.P. ("Sprint"), ATX Telecommunications Services, Ltd. ("ATX"), the Central Atlantic Payphone Association ("CAPA"), Commonwealth Telecom Services, Inc. ("CTSI"), the Pennsylvania Cable & Telecommunications Association ("PCTA"), the Internet Service Providers ("ISP"), Connectiv Communications, Inc., and Sprint Communications Company L.P.

AT&T filed a motion to dismiss BA-PA's petition on January 5, 1998 due to the broad nature of BA-PA's petition. On January 5, 1998, CAPA filed a partial motion to dismiss the section of BA-PA's Petition which requested competitive classification of Payphone Network Services. BA-PA filed an answer to both motions to dismiss on January 15, 1998.

A prehearing conference was held in this case on February 5, 1998. During the conference, I denied AT&T's and

CAPA's motions to dismiss. Also, a schedule was established based on a 270 day time frame.[1]

On February 11, 1998, BA-PA filed its written direct testimony.

On February 12, 1998, BA-PA filed a petition for Commission review and answer to a material question in an attempt to have the Commission require that the case be heard within 180 days rather than 270 days. On February 19, 1998, several parties filed responses opposing BA-PA's petition, including MCI, AT&T, CAPA and OCA. On March 30, 1998, the Commission issued an Order finding that 180 day time limit in 66 Pa.C.S. §3005(a) for concluding a Petition is directory and not mandatory. Accordingly, the Commission ordered that the parties proceed in accordance with the schedule set forth in my Second Prehearing Order of February 20, 1998.

On March 3, 1998, BA-PA applied to me for subpoenas to either take depositions or for the production of documents to be served on all non-party Competitive Local Exchange Companies ("CLECs"). The purpose of the subpoenas was to permit BA-PA to obtain evidence regarding the presence and viability of other competitors (for business telecommunications services), including market shares, the availability of like or substitute services, the relevant geographic area, and the ability of other entities to offer services or activities at competitive prices, terms and conditions. (Application at ¶¶ 3-4). Through a series of three

[1] The schedule and decision regarding the motions to dismiss were included in my Second Prehearing Order of February 20, 1998.

orders, I approved BA-PA's request for subpoenas, with the exception of 11 names withdrawn by BA-PA and one or more CLECs which provided BA-PA with information without the subpoena.

All other parties filed their direct testimony on March 27, 1998. BA-PA filed rebuttal testimony on May 6, 1998. Other parties filed surrebuttal testimony or outlines of oral surrebuttal testimony between May 15 and May 20, 1998. BA-PA filed outlines of oral surrejoinder testimony on May 26, 1998.

Public input hearings were held in Williamsport on March 16, 1998 and in Scranton on March 17, 1998. Thirteen individuals representing businesses, schools, local agencies or associations testified regarding BA-PA's Petition.

Hearings were held on May 27-29 and June 1-2. Overall, twenty witnesses were presented by several parties, including five witnesses for Bell Atlantic, four witnesses each for MCI and AT&T, two witnesses for TCG, and one witness each for OTS, OSBA, OCA, CAPA, and CTSI. The hearings resulted in a transcript of 1,708 pages of oral testimony; 83 exhibits, including statements of written testimony were admitted into the record.

DISCUSSION

I. Introduction.

By this petition, BA-PA seeks to have the Commission declare competitive all telecommunications services provided to businesses throughout BA-PA's service territory. This would have the effect of eliminating most regulatory oversight of 84 separate services that are identified in BA-PA St. 1, Appendix B.

Under BA-PA's view of the case, if this petition is granted, with respect to each of these services, BA-PA will be allowed to raise or lower rates as it desires. BA-PA may also impose new terms and conditions on the use of these services, or may discontinue offering these services. (Tr. 429-431, 462). BA-PA proposes to meet the imputation test of Chapter 30 by aggregating the revenues for all of these services. That is, a proposed rate for a deregulated BA-PA business service would pass the imputation test as long as the revenues for all business services exceed the revenues that BA-PA would realize from the sale of the associated basic service functions to its competitors. Thus, BA-PA would be free to offer some services at below cost as long as others were priced above cost. According to BA-PA, even a price of zero on a specific service would not flunk this test. (Tr. 339).

When I first saw BA-PA's petition in this case, I was surprised. It seemed to describe a telecommunications market with which I am completely unfamiliar after hearing many cases, over the past two and one-half years, that specifically relate to telecommunications deregulation and competition. I could not begin to imagine how BA-PA planned to establish that all business telecommunications services are competitive throughout its entire service territory. I expressed that opinion to the parties during the prehearing conference. (Tr. 15-16).

Having now presided over this case from the prehearing conference through briefing, I conclude that BA-PA has not come close to establishing the major fact that it must establish to prevail here, namely, that there is effective competition for

business services throughout BA-PA's service territory such that BA-PA would be unable to sustain price increases for its services. BA-PA's presentation on the issue of competitive presence does not withstand even the most cursory review. For this reason, I recommend denying this petition.

I also urged BA-PA to present evidence in support of partial relief (i.e., a grant of competitive status limited to certain services, customers, or geographic areas). (Tr. 17-18). BA-PA has not made such a presentation. As will be discussed further, BA-PA is now asking for partial relief based on certain record evidence, if full relief is not granted. For reasons that I will discuss, I also recommend that partial relief not be granted here.

Because I believe that BA-PA has failed to establish the primary fact that it needs to establish, I will not discuss in minute detail every argument made by the parties. I will, however, attempt to touch on more important issues that may be revisited in other cases in the future.

One other point is worth mentioning here. BA-PA's petition has one attractive feature. It presents an opportunity to bring about politically unpopular, but economically necessary, rate rebalancing under the guise of promoting competition. While this result may have something to recommend it, conditions in Pennsylvania are such that granting the petition now is likely to result in almost immediate rate rebalancing, but very little competition (which <u>might</u> serve to restrain rural rates) any time soon.

II. The Statutory Criteria.

This proceeding is governed by 66 Pa.C.S. §3005, which provides:

> (a) Identification of competitive service.--The commission is authorized to determine, after notice and hearing, whether a telecommunications service or other service or business activity offered by a local exchange company is a competitive service. A local exchange telecommunications company may petition the commission for a determination of whether a telecommunications service or other service or business activity offered is competitive, either in conjunction with a petition to be regulated under an alternative form of regulation or at any time after the granting of the petition. . . . In making the determination, the commission shall consider all relevant evidence submitted to it including evidence presented by providers of competitive services. In a proceeding to determine whether a telecommunications service or other service or business activity offered is a competitive service, the following shall apply:
>
> (1) The commission shall make findings which, at a minimum, shall include evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs; presence and viability of other competitors, including market shares; the ability of competitors to offer those services or other activities at competitive prices, terms and conditions; the availability of like or substitute services or other activities in the relevant geographic area; the effect, if any, on protected services; the overall impact of the proposed regulatory changes on the continued availability of existing services; whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis; the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity and any other relevant factors which are in the public interest. . . .

> (2) The burden of proving that a telecommunications service or other service or business activity offered is competitive rests on the party seeking to have the service classified as competitive.
>
> . . . .
>
> (e) Additional Determinations.--The commission shall determine whether local exchange telecommunications companies are complying with the following provisions:
>
> (1) The local exchange telecommunications company shall unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service.
>
> (2) The price which a local exchange telecommunications company charges for a competitive service shall not be less than the rates charged to others for any basic service functions used by the local exchange telecommunications company or its affiliates to provide the competitive service. Revenues from the rates for access services reflected in the price of competitive services shall be included in the total revenues produced by the noncompetitive services.

Thus, before any other issues may be addressed, it is first necessary to determine if the record supports findings favorable to BA-PA for each of the following criteria:

> 1. Ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs;
>
> 2. Presence and viability of other competitors, including market shares;
>
> 3. The ability of competitors to offer those services or other activities at competitive prices, terms and conditions;

4. The availability of like or substitute services or other activities in the relevant geographic area;

5. The effect, if any, on protected services;

6. The overall impact of the proposed regulatory changes on the continued availability of existing services;

7. Whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis; and,

8. The degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity and any other relevant factors which are in the public interest.

III. Burden of Proof.

Pursuant to 66 Pa.C.S. §3005(a)(2), BA-PA, as the petitioner seeking a competitive declaration for all of its business telecommunications services, has the burden of proving the competitiveness of these services. BA-PA argues in its reply brief that although BA-PA bears the burden of proof of competitiveness, once the party with the burden of proof has introduced evidence which would support a finding in its favor, the burden of going forward swings to its opponents, citing Pa. Pub. Util. Com. v. Citizens Util. Water Co., 169 P.U.R. 4th 552 (1996). While BA-PA's comment is true as far as it goes, it stops short of acknowledging, as it must, that while the burden of going forward shifts, the burden of proof does not. It always remains on the party whose duty it is to establish a particular fact. Replogle v. Pennsylvania Electric Co., 54 Pa. PUC 528, 530 (1980).

In fact, to shift the burden of going forward, the party with the burden of proof must present a prima facie case in support of its claims. When a prima facie case has been established, the burden of going forward shifts. A prima facie case, however, is insufficient to win if the opponent produces evidence which is coequal to that produced by the party with the burden of proof. Ranlogle, 54 Pa. PUC at 530.

The Supreme Court has also determined that the party with the burden of proof must do more than just establish a prima facie case. The party with the burden of proof must meet that burden with evidence which proves its cause of action of such weight as to preclude all reasonable inferences to the contrary. In the case of a claim of overbilling by a utility customer, the Supreme Court stated:

> Whereas a litigant establishes a prima facie case by producing enough evidence to support a cause of action, the burden of proof is met when the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary. [Citations omitted.]

Burleson v. Pa. P.U.C., 501 Pa. 433, 437, 461 A.2d 1234, 1236 (1983).

Thus, BA-PA bears the burden of establishing facts necessary to support the required findings by substantial evidence.

IV. BA-PA's Case.

BA-PA's argument is support of its petition is set forth succinctly at pages 1 through 4 of its main brief:

> Chapter 30 of the Public Utility Code permits competitive classification "of a telecommunications service or business activity" where there is sufficient evidence of: the ease of market entry, the presence and viability of competitors (including market shares), the ability of those competitors to offer the service or activity at competitive prices, terms and conditions, and the availability of like or substitute services or activities are available throughout the relevant geographic area. The business telecommunications market in Pennsylvania today meets all these criteria - in fact, the growth of competition in this market is explosive and continues to accelerate. Bell Atlantic - Pennsylvania, Inc.'s ("BA-PA") petition should therefore be granted.
>
> Chapter 30 removed the legal barriers to entry into the local exchange market, and, by expeditiously implementing the local competition provisions of the federal Telecommunications Act, the Commission has removed the last significant economic barriers to entry. As a result, the pace of competition for all telecommunications services -- but particularly in the provision of business telecommunications services -- has accelerated dramatically in terms of competitors' geographic presence and rate of market share growth.
>
> Virtually all (94%) business access lines in BA-PA's service territory are served by a wire center where at least one local competitor is present. Three quarters (76%) are served by wire centers where a facilities-based competitor is located. Thus, BA-PA's competitors are present throughout the geographic area where business customers are found. The rapid growth of competition is also reflected in the increases in the minutes of use BA-PA has exchanged with CLECs, and the resold lines, unbundled loops, and ported numbers BA-PA has provided to CLECs. In fact, every quantitative measure

of competitive activity presented in this case shows dramatic, double-digit growth since this Petition was filed late in 1997. BA-PA's competitors are thriving by pursuing a strategy of offering comprehensive packages of telecommunications services to business customers. This permits them to make the most of two advantages they have over BA-PA. First, they can offer pricing plans that are tailored to customers' needs—discounts based on aggregate revenue or "free" local calling, for example. Second, they can enhance their offerings by including services BA-PA is not permitted to offer, such as interLATA and wireless services.

Large, medium, and even smaller-sized business customers (those who spend $10,000 annually on local exchange, intraLATA toll, and special services) have access to competitive "one-stop-shopping" alternatives throughout BA-PA's service territory, and have for many years. But the competitive activity is not limited to these customers. Competitors are providing competitive telecommunications packages to smaller businesses as well. [BEGIN CLEC PROPRIETARY]

[END CLEC PROPRIETARY]

The presence of competitors in nearly every wire center serving business customers, their viability as demonstrated by the robust growth in their market shares, their access to unbundled network elements, their ability to purchase BA-PA services at a discount for resale to aggregated customers, the competitiveness of their service packages, and customers' increasing demand for "one-stop-shopping" and tailored discounts, taken together, ensure that competition will constrain BA-PA's ability to raise prices for business telecommunications service above market levels

Despite the foregoing evidence of competition, the existence (if not the sufficiency) of which is largely undisputed, BA-PA's competitors allege that a variety of conditions constitute insurmountable "barriers to entry" which prevent CLECs from

competing effectively with BA-PA. However, none of these purported "barriers" amount to anything more than inconveniences or the result of what can only be described as disingenuous regulatory posturing. Moreover, the competitors' protests that the obstacles to entry are insurmountable cannot be reconciled with the explosive growth in the market shares of competitors like [BEGIN CLEC PROPRIETARY] [redacted] [END CLEC PROPRIETARY] in just five months.

In addition to demonstrating that the provision of business telecommunications service qualifies for competitive classification, BA-PA has shown that its provision of business services complies with the competitive safeguards and other requirements of Chapter 30. The only serious dispute relates to the level at which the imputation analysis should be performed. Both BA-PA's and AT&T's economic experts agreed, however, that imputation should be applied at the same market level that the competitive analysis occurs—here, all business telecommunications service provided throughout BA-PA's service territory. Imposing imputation at a more disaggregate or geographically-partitioned level will increase distortions inherent in Chapter 30's imputation standard, reduce BA-PA's ability to compete on the basis of price, and thus deprive business customers of the full benefits of competition.

The record convincingly demonstrates that competition in the business telecommunications market is fully entrenched in Pennsylvania, at all customer sizes and all geographic areas. Granting BA-PA's Petition would further unleash the competitive pressure necessary to ensure that the full benefits of competition are available to all business customers. BA-PA's Petition should therefore be granted. (Footnotes omitted; emphasis in the original.)

The major premise of BA-PA's argument is that certain statistics show that there is viable competition for all kinds of